

Feb. 3, 2006

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Sent by email to: nepataskforce@mail.house.gov

Greetings:

Thank you for the opportunity to comment on the above-referenced report. By way of background, I am an Attorney and Policy Analyst with the International Center for Technology Assessment, a non-profit group in Washington concerned with, among other topics, the environmental impacts of new technologies. I have more than 15 years experience with all facets of NEPA. I have overseen the preparation of several Environmental Assessments (EAs) and one full Environmental Impact Statement (EIS) for the government as a contractor, and I have litigated against the adequacy of such NEPA documents (or the failure to prepare them in the first place) as a private attorney. I have consulted with the Justice Department in defending a NEPA lawsuit against the U.S. Fish and Wildlife Service. I taught NEPA compliance seminars to Federal officials in the Southwest. I prepared a draft NEPA Guidance document as a contractor for the National Invasive Species Council. And I have commented and written on NEPA issues.

GENERAL COMMENTS:

Every aspect of the draft report suffers from the fact it is virtually entirely anecdotal. It contains few references to supporting information, literature, or data on NEPA. The few cites to particular public comments are biased toward critical comments. It is written in a disjointed, rambling, and too-opinionated tone such that the draft fails to qualify as a professional, objective, reliable review.

If the approach used in writing this report were used in an actual EA or EIS for a proposed Federal agency action, it would be sent back to the agency writers for revision as being plainly inadequate. In short, if you do publish a revision of your draft you should retain a professional writer familiar with how to prepare a properly-referenced and supported report. (See CEQ regulation 40 CFR sec.1502.8, which mandates clear and well-supported writing for EISs.) You also need someone who is more familiar with basic NEPA terminology as defined in the CEQ NEPA implementing regulations than the draft's author appears to be.

On the whole, the draft report's Recommendations, if actually enacted into law or regulations, would "backfire" and actually increase the level of confusion, litigation, and delay that the Task Force was set up to address. The reasons for this are given below.

NEPA TASK FORCE

SPECIFIC COMMENTS:

Page 9, last paragraph, last sentence, says: "However, it was noted that agencies are defaulting to the preparation of an EIS without fully debating whether or not the action is 'major' as currently set forth in regulations."

- In fact, if this alleged "default" is occurring it is to preparation of an EA, not a full EIS. Only a small number of EISs are prepared by Federal agencies compared to the number of much shorter and faster EAs. (See sec.s 1501.3 and 1508.9) This statement in the draft suggests that the author wasn't aware of the distinction. This concern is confirmed in the 2nd to last par. at the bottom of p. 11 where it states there are "approximately 50,000 EISs filed each year." EAs, yes; EISs, no. See p. 18, 2nd par., where much smaller numbers (< 600) are given for the actual number of full EISs prepared annually.

p. 10, 2nd to last par., says: "... it is difficult to understand how the government would retract or retreat into pre-NEPA practices if the statute were to be amended."

- Actually it is not difficult to understand. Numerous Federal bureaus have already turned avoidance of NEPA's requirements into a virtual art form - allowing too many Categorical Exclusions, doing EAs and Findings of No Significant Impact (FONSIs) instead of EISs; not doing any programmatic NEPA compliance at all; etc. If Congress amended NEPA to further relax requirements that many bureaus already avoid, then it is foreseeable and perfectly "understandable" that very little formal and transparent-to-the-public environmental analysis will be done at all on future proposed Federal actions and programs.

p. 18, 2nd par., says: "The increased length and complexity of NEPA related documents cannot be disputed."

- Here is a "dispute": the figures given in the draft do not prove that point at all. The figures given simply do not confirm that the length, complexity or average annual number of EISs have steadily increased. Further, the Cambridge Scientific Abstracts (CSA) figure given for average length of Final EISs as "742 pages," compared to the "300 pages" in the CEQ regulation at sec.1502.7, fails to mention that the number in the regulation of 300 pages refers only to the EIS's analytical sections. The 300 page recommended limit does not include the pages for numerous other required sections of the full document, including the always lengthy lists and appendices. (See sec. 1502.10) These lists and appendices, often containing actual copies of, and detailed responses to, sometimes thousands of public comments, can amount to several hundred pages depending on the volume of public involvement. There is no CEQ regulation setting a maximum length of those sections. This fact no doubt explains the seemingly high average page number in the CSA compilation. Thus, the Task Force implication that the

NEPA TASK FORCE

CEQ page limit recommendations are routinely vastly exceeded by agencies is misleading.

p. 18, 2nd to last par. says: ".. there is no one governmental body that can take responsibility for agency mismanagement of the NEPA process."

- This is wrong. Each major Federal Department has a special NEPA compliance office to oversee that agency's management of NEPA at the field level. Then, CEQ oversees the entire Federal government. If there is mismanagement, those agency NEPA offices and CEQ can, should, and regularly do step in. Those bodies can be directed and "resourced" to do more active oversight, if necessary, without amending NEPA or the implementing regulations.

p. 19, 3rd par., 3rd sent., says: "While there are standards for the issuance of supplemental [NEPA] documents, there is a perception – and some evidence – that there is no consistent application of these standards."

- It is unprofessional to refer to "a perception" (whose? where? when? based on what?) and "some evidence." If "evidence" exists, cite to it and back up the statement. "Perceptions" are vague, subjective, and provide no adequate basis for important policy decisions.

p. 19, last par., says: "Another suggestion from a number of witnesses related to alternatives is to make mitigation actions found in proposed alternatives mandatory."

- It makes sense that the final "chosen" alternative in the Record of Decision, if it partially consists of mitigation actions, must be fully implemented so as to include the mitigation parts. Otherwise the agency that proposed and chose that alternative would have misled the public. But, the way the sentence is written seems to suggest that any mitigation action in any proposed alternative analyzed in an EIS must be mandatory. This of course does not make sense if the proposed alternative is not chosen and not acted on.

p. 22, footnote 6: This footnote and the point it claims to support rely entirely on two unsupported anecdotes that both come from highly controversial Endangered Species Act-related actions. One of the anecdotes, alleging a lack of NEPA compliance for interim guidelines for Mexican spotted owl protection, is 16 years old and appears to be legally incorrect on its face. They are hardly persuasive evidence for NEPA reform.

p. 25 and following on the draft's RECOMMENDATIONS:

NEPA TASK FORCE

Recommendation 1.1 - A very vague recommendation with no support or explanation of what allegedly needs changing in the CEQ's current, adequate, and time-tested definition of "major federal action" at sec. 1508.18.

Recommendation 1.2 - The notion of an inflexible time limit, such that a NEPA document that is not completed within the time frame nonetheless "will be considered completed," is entirely unworkable. If that were adopted into law, it would clearly lead to a number of unfinished, thus inadequate, EAs and EISs and increase the amount of litigation over their inadequacy. The plain effect will be to delay more projects through needless litigation over procedural issues.

Recommendation 2.1 - Favoring "local interests" as opposed to "outside concerns" is vague, biased, and entirely unworkable. No CEQ regulation could come up with a definition of those terms that was not obviously unfair to large groups of citizens. In effect, it denies Constitutionally-mandated equal protection under the law to so-called "outsiders" whose ownership and other interest in a public national park, forest, or wildlife refuge is just as real and legitimate as a local person's. This xenophobic idea belongs on history's scrap heap.

Recommendation 2.2. - See comment regarding page 18, above, on misleading information in the draft report about page limits. Any reform of NEPA related to page limits must make allowance for the necessarily lengthy appendices.

Recommendation 3.1 - This Recommendation deserves special recognition along with Recommendation 2.1, above, as being entirely unworkable. Mandating that county and other governments be given "cooperating agency" status on Federal EAs and EISs will empower them to endlessly delay and even block Federal projects that they do not want in their area. Currently State, local, and tribal governments can become "cooperating agencies" under sec. 1508.5 if they are requested to by the lead Federal agency and they sign a cooperative agreement that details the expectations of their involvement. Making that into a mandatory obligation that other government entities can in effect impose on a Federal agency would be unwise and allow recalcitrant non-"cooperators" to run roughshod over Federal NEPA processes. (See the detailed expectations from cooperating agencies in sec. 1501.6(b).) On both Recommendations 3.1 and 3.2, several of their concepts already are well-defined in sec. 1506.2 on "Elimination of duplication with State and local procedures." The Task Force's draft report provides no indication as to why that time-tested regulation is now inadequate and must be replaced.

Recommendation 4.1 - The concepts used to describe the proposed citizen suit provision are vague, unworkable, and unnecessary. It simply is not fair or feasible to legislate that a party on a NEPA appeal would not have standing unless it was "involved throughout the process." Much NEPA litigation involves situations where the agency "process" was non-existent, too secretive, inadequate, or incorrect. Parties cannot be expected to be involved in every step of such processes or else lose their future standing to sue. Also, it is grossly unfair to deny standing to an individual unless he or she raised every single important legal and factual issue that may surround a proposal from the very beginning of

NEPA TASK FORCE

the process. Often the full contours of a proposal are not clear until more light is thrown on it. This Recommendation's attempts to limit standing to bring a suit violates separation of powers as it is our Federal courts that decide on standing. And creating the proposed Statute of Limitation (SOL) of 6 months (180 days) to challenge any record of decision is so short as to violate basic fairness under American administrative law. Such agency decisions are not made pursuant to NEPA itself, they are made pursuant to other substantive agency laws (NEPA being only procedural.) As written this Recommendation appears to sweep very broadly so as to limit all such litigation over agency decisions in which NEPA was involved. It would be impractical to have a separate SOL for NEPA claims in a lawsuit only, as NEPA claims are virtually always brought with and closely related to other substantive legal claims that would not be subject to the SOL. The end result would be mass legal confusion.

Recommendation 5.1 - The idea of only considering alternatives that are "economically and technically feasible" is misconceived. It is ultimately the EA or EIS itself that provides the analysis needed to determine just how feasible an alternative is. Agencies cannot be expected to do extensive pre-NEPA analysis before deciding on which alternative actions to assess. The CEQ regulations now do include extensive requirements that alternatives assessed in an EIS must be reasonable and be subject to a scoping process to further define them. (Sec. 1500.4(g) et al.) The Task Force draft report simply makes no showing that EISs are wasting agency resources by assessing alternatives that make no sense, or – worse yet - that agencies are ultimately choosing insensible alternatives as their Preferred Alternatives. This vague Recommendation on the whole is another recipe for more, not less, litigation.

Recommendation 5.2 - This poorly-thought-through Recommendation would convert NEPA into a substantive rather than a procedural statute. It would impose a presumption on all Federal agencies that they must reject the "No Action" alternative in an EIS. For example, if an EIS was assessing the impacts of a proposal to destroy the Snake River hydroelectric dams, Recommendation 5.2 would mandate a presumption that the responsible agencies actually have to implement that action. (The "No Action alternative" being to keep the dams in place.) This is all the more surprising because not one shred of evidence is in the draft report that somehow Federal agencies are choosing the No Action alternative in EISs more than they should. Further, existing EIS requirements at sec. 1502.14, as developed through case law, already require even-handed assessment of the No Action alternative compared to the action alternatives, contrary to the suggestion in Recommendation 5.2.

Recommendation 8.1 - This recommendation on how "cumulative impacts" are to be assessed is impossibly vague, making no sense to any experienced NEPA practitioner.

Recommendation 8.2 - The intent of this seems to be to make agencies intentionally short-sighted and focused only on "concrete" actions when assessing "cumulative impacts," at the expense of less concrete actions that are nevertheless plainly foreseeable. Future weed invasions in Western public rangelands are plainly foreseeable, as are future Federal managers' attempts to control their spread - are they to be ignored? The same is

NEPA TASK FORCE

true of future Federal actions contributing to climate change – are they to be ignored? Ignoring foreseeable future trends is a recipe for poor analysis and worse decisionmaking, and violates the basic point of NEPA of trying to take foreseeable future actions into account so as not to leave the country a mess for future generations.

The other Recommendations do not appear needed either, based on the weak support in the draft Report for them.

CONCLUSION:

Delays attributed to the burden of preparing EAs and EISs often reflect indecision or uncertainty on an agency's part about whether to proceed with a proposed action. Such delays often are not due to NEPA's requirements, but to external factors. What is clear is that NEPA - when properly implemented - vastly improves the transparency of agency decisions and in many cases has resulted in much better decisions for American taxpayers as well as the environment.

The main cause of litigation under NEPA is when the action agencies attempt to avoid or shortcut it. When agencies take it seriously, adequately staff and support their NEPA offices, and follow the CEQ regulations for compliance, NEPA documents are produced in a timely way and the agencies do not get successfully sued. Supporting these aims would be the best thing Congress could do avoid litigation and delays.

Please contact me if I may provide any more information.

Peter T. Jenkins
Attorney/Policy Analyst
International Center for Technology Assessment
660 Pennsylvania Ave. SE, Suite 302
Washington, DC 20003
Tel: 202.547.9359
Email: peterjenkins@icta.org